A **PP v. FARZANEH KHAYATYTORBATY MOHAMMADMAHDI & ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN JCA
B ABANG ISKANDAR JCA
[CRIMINAL APPEALS NO: B-05-94-04-2013)
& B-05-163-06-2013]
12 DECEMBER 2014

C ***CRIMINAL LAW:*** *Appeal – Appeal against acquittal and conviction – Accused persons charged for trafficking in 5,324 grams of methamphetamine – Drugs found concealed in first accused person's bag – Baggage tag bore name of another person who travelled on same flight – Defence that bag was borrowed – Whether defence probable – Whether knowledge of drugs could be presumed from conduct of first accused in looking restless – Whether all items found in bag belonged to first accused* D *person – Failure to call person whose name appeared on baggage tag – Whether caused gap to prosecution's case – Whether conviction and sentence of first accused person safe – Dangerous Drugs Act 1952, ss. 37(d) & 39B(2)*

CRIMINAL PROCEDURE: *Appeal – Appeal against acquittal – Accused persons* E *charged for trafficking in 5,324 grams of methamphetamine – Drugs found concealed in bag carried by first accused – Second accused person merely walked behind first accused person – DNA profile of second accused person found on clothing items – Whether clothing items came from bag containing drugs – Whether there was common intention between accused persons to traffick drugs – Whether second accused person had custody and control over drugs – Dangerous Drugs Act 1952,* F *ss. 37(d) & 39B(2)*

The accused persons had arrived at KLIA from Doha and the first accused was earlier seen to be restless when he retrieved two bags ('exhs. P34 and P35') from the carousel. After the accused persons were detained by the police, exhs. P34 and P35 were examined and discovered to contain G translucent plastic packets of substances later confirmed by the chemist to be 5,324 grams of methamphetamine. Several clothes found in exhs. P34 and P35 had the DNA profile of both the accused persons. The accused persons were charged for the offence of trafficking in dangerous drugs under s. 39B(2) of the Dangerous Drugs Act 1952 ('the Act') read with s. 34 of the Penal H Code in the High Court. In his defence, the first accused person submitted that his bag was damaged while travelling, which led him to borrow the bags from one 'Saeid Zoughi' without any knowledge of the concealed substances in the said bags. The trial judge held that the first accused person had failed to rebut the presumption of knowledge on the balance of probability and the I latter was found to have had custody and control of exhs. P34 and P35 which he had consciously collected despite the fact that the tags attached to the bags

bore the name of Saeid Zoughi. Since the drugs were concealed, the trial judge invoked s. 37(d) of the Act to presume knowledge on the part of the first accused person. The first accused person was convicted for the charge and sentenced to death. However, the second accused person was acquitted and discharged as it was held that the tags attached to exhs. P34 and P35 did not bear her name. Hence, the present appeal. The prosecution appealed against the acquittal and discharge of the second accused person while the first accused person appealed against his conviction and sentence.

Held (dismissing appeal by prosecution against discharge and acquittal of second accused person; allowing appeal of first accused person and setting aside his conviction and sentence)
Per Tengku Maimun JCA delivering the judgment of the court:

(1) The second accused person was found to have no custody and control over the drugs and there was no reason to disturb the findings of the trial judge. Based on the evidence of SP4, there was absent any conduct of the second accused person where an inference of knowledge could be drawn against her. Coupled with the fact that the bags bore the name tag of Saeid Zoughi, the trial judge was correct when Her Ladyship was not prepared to convict the second accused person if she had remained silent. (para 21)

(2) The only evidence against the second accused was the DNA match on two clothing items ('the items'). However, it could not be said for certain that the items came from exhs. P34 or P35. There was a missing link in the chain of evidence as to the source from where the items came from and that this missing link had to be drawn in favour of the second accused person. (paras 23-25)

(3) The fact that the second accused person had travelled on the same flight with the first accused person and had sat together during the flight before landing at KLIA was not sufficient to establish any pre-arranged plan or common intention between both accused persons to traffick in the drugs. Furthermore, the flight manifestly showed that Saeid Zoughi was also travelling on the same flight with the accused persons. (paras 26 & 28)

(4) The trial judge erred in relying heavily on the conduct of the first accused person in picking the bags from the carousel and that he was looking restless to presume that he had knowledge of the drugs in the bags. The trial judge failed to consider the other evidence which lent credence to the defence of the first accused person that he had no knowledge of the drugs in the bags. (paras 32 & 33)

(5) There were clothes of different sizes in exh. P34 and not all the items found in it were sent for DNA analysis. There was thus no evidence that all the items in exh. P34 belonged to the first accused person which left

a reasonable doubt as to whether he had knowledge of the contents in the bag let alone the drugs which were hidden underneath in the bags. The trial judge failed to exclude the probability that the bags were under the control and custody of Saeid Zoughi prior to the arrest of the first accused person. (paras 34 & 38)

(6) The luggage tags of exhs. P34 and P35 bore the name of Saeid Zoughi which supported the defence version that it was Saeid Zoughi who had checked in the bags and that the bags belonged to Saeid Zoughi. Saeid Zoughi was thus a necessary witness to confirm or to negate the defence of the first accused person that the latter had no knowledge of the drugs in the bags as the bags were not his. Where Saeid Zoughi was available but he was not called by the prosecution nor was he offered to the defence, the failure ought not to be ruled against the first accused person. The failure of the prosecution to call Saeid Zoughi had left a gap in the prosecution's case and had rendered the conviction of the first accused person unsafe. (paras 37 & 38)

Bahasa Malaysia *Translation Of Headnotes*

Tertuduh-tertuduh telah tiba di KLIA dari Doha dan tertuduh pertama pada awalnya dilihat gelisah ketika mengambil dua beg ('eks. P34 & P35') dari karusel. Selepas tertuduh-tertuduh ditahan oleh pihak polis, eks. P34 dan P35 diperiksa dan didapati mengandungi bungkusan-bungkusan plastik mengandungi serbuk yang kemudiannya disahkan oleh ahli kimia sebagai 5,324 gram Methamphetamine. Beberapa helai pakaian yang dijumpai di dalam eks. P34 dan P35 mempunyai profil DNA kedua-dua tertuduh. Tertuduh-tertuduh dipertuduh atas kesalahan mengedar dadah berbahaya di bawah s. 39B(2) Akta Dadah Berbahaya 1952 ('Akta') dibaca bersama-sama dengan Kanun Keseksaan di Mahkamah Tinggi. Dalam pembelaannya, tertuduh pertama menghujahkan bahawa begnya koyak semasa dalam perjalanan, menyebabkannya meminjam beg-beg daripada seorang yang bernama 'Saeid Zoughi' tanpa sebarang pengetahuan mengenai dadah-dadah yang tersembunyi di dalam beg-beg tersebut. Hakim bicara memutuskan bahawa tertuduh pertama gagal menyangkal anggapan pengetahuan atas imbangan kebarangkalian dan tertuduh pertama didapati mempunyai jagaan dan kawalan ke atas eks. P34 dan P35 yang mana dia telah ambil secara sedar walaupun tanda pada beg tertera nama Saeid Zoughi. Oleh kerana dadah-dadah tersebut disembunyikan, hakim bicara membangkitkan s. 37(d) Akta untuk menganggap bahawa terdapat pengetahuan oleh tertuduh pertama. Tertuduh pertama disabitkan atas kesalahan dan dijatuhkan hukuman mati. Walau bagaimanapun, tertuduh kedua dilepaskan dan dibebaskan kerana diputuskan bahawa tanda-tanda yang terdapat pada eks. P34 dan P35 tidak tertera namanya. Oleh itu, rayuan ini. Pihak pendakwaan merayu terhadap pelepasan dan pembebasan tertuduh kedua manakala tertuduh pertama merayu terhadap sabitan dan hukumannya.

Diputuskan (menolak rayuan oleh pihak pendakwaan terhadap pelepasan dan pembebasan tertuduh kedua; membenarkan rayuan tertuduh pertama dan mengenepikan sabitan dan hukuman)
Oleh Tengku Maimun HMR menyampaikan penghakiman mahkamah:

(1) Tertuduh kedua didapati tidak mempunyai jagaan dan kawalan ke atas dadah-dadah tersebut dan tidak terdapat sebab untuk mengganggu dapatan hakim bicara. Berdasarkan keterangan SP4, tidak terdapat perlakuan tertuduh kedua daripada mana inferens mengenai pengetahuan boleh dibuat terhadapnya. Digandingkan dengan fakta bahawa beg-beg tersebut tertera nama Saeid Zoughi, hakim bicara bertindak betul apabila beliau tidak bersedia untuk mensabitkan tertuduh kedua sekiranya dia kekal berdiam diri.

(2) Satu-satunya keterangan terhadap tertuduh kedua adalah padanan DNA ke atas dua item pakaian ('item-item tersebut'). Walau bagaimanapun, tidak boleh dinyatakan dengan jelas bahawa item-item tersebut datang daripada eks. P34 dan P35. Terdapat pemutusan hubungan dalam rantaian keterangan mengenai sumber daripada mana item-item tersebut datang dan pemutusan hubungan ini perlu diputuskan berpihak kepada tertuduh kedua.

(3) Fakta bahawa tertuduh kedua telah menaiki kapal terbang yang sama dengan tertuduh pertama dan telah duduk bersama-sama semasa penerbangan sebelum mendarat di KLIA tidak cukup untuk membuktikan rancangan yang telah diatur terlebih dahulu atau niat bersama antara kedua-dua tertuduh untuk mengedar dadah. Tambahan lagi, penerbangan jelas menunjukkan bahawa Saeid Zoughi juga menaiki kapal terbang yang sama dengan tertuduh-tertuduh.

(4) Hakim bicara terkhilaf dalam bergantung berat kepada perlakuan tertuduh pertama dalam mengambil beg-beg daripada karusel dan bahawa dia kelihatan gelisah untuk menganggap bahawa dia mempunyai pengetahuan mengenai dadah-dadah di dalam beg-beg. Hakim bicara gagal mempertimbangkan keterangan-keterangan lain yang memberi kredibiliti kepada pembelaan tertuduh pertama bahawa dia tidak mempunyai pengetahuan mengenai dadah-dadah di dalam beg.

(5) Terdapat pakaian-pakaian pelbagai saiz dalam eks. P34 dan tidak kesemua item yang dijumpai di dalamnya dihantar bagi analisa DNA. Oleh itu, tidak terdapat keterangan bahawa kesemua item dalam eks. P34 dimiliki oleh tertuduh pertama yang membangkitkan satu keraguan munasabah mengenai sama ada dia mempunyai pengetahuan mengenai kandungan-kandungan di dalam beg apatah lagi dadah-dadah yang tersembunyi di dalam beg-beg tersebut. Hakim bicara gagal untuk menidakkan kebarangkalian bahawa beg-beg tersebut berada di bawah jagaan dan kawalan Saeid Zoughi sebelum penangkapan tertuduh pertama.

(6) Tanda-tanda bagasi pada eks. P34 dan P35 tertera nama Saeid Zoughi yang menyokong versi pembelaan bahawa Saied Zoughi yang telah mendaftar masuk beg-beg tersebut dan bahawa beg-beg tersebut dimiliki oleh Saeid Zoughi. Oleh itu, Saeid Zoughi adalah saksi yang diperlukan untuk mengesahkan atau menidakkan pembelaan tertuduh pertama bahawa tertuduh pertama tidak mempunyai pengetahuan mengenai dadah-dadah di dalam beg-beg tersebut kerana beg-beg tersebut bukanlah miliknya. Jika ada Saeid Zoughi tetapi dia tidak dipanggil oleh pihak pendakwaan mahupun ditawarkan kepada pihak pembelaan, kegagalan tersebut tidak sepatutnya diputuskan bertentangan dengan tertuduh pertama. Kegagalan pihak pendakwaan untuk memanggil Saeid Zoughi menyebabkan kelompongan dalam kes pihak pendakwaan dan menjadikan sabitan tertuduh pertama tidak selamat.

Case(s) referred to:
Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
Lew Wai Loon v. PP [2014] 2 CLJ 649 FC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(refd)***
Siew Yoke Keong v. PP [2013] 4 CLJ 149 FC ***(refd)***
Wan Rusdi Wan Musa v. PP [2012] 7 CLJ 16 CA ***(refd)***
Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(refd)***
Zulfikar Mustaffah v. PP [2001] 1 SLR 633 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), 39B(2)
Evidence Act 1950, s. 114(g)
Penal Code, s. 34

(Criminal Appeal No: B-05-94-04-2013)
For the prosecution - Nadia Hanim Mohd Tajuddin, DPP
For the respondent - N Sivananthan (Syazlin Mansor with him); M/s Sivananthan

(Criminal Appeal No: B-05-163-06-2013)
For the appellant - Hue Kok Chung; M/s KC Hue
For the prosecution - Nadia Hanim Mohd Tajuddin, DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-235-2010]

Reported by Amutha Suppayah

JUDGMENT

Tengku Maimun JCA:

[1] Mohamad Jafar Khayati Torbati Mohammadali was charged together with Farzaneh Khayatytorbaty Mohammadmahdi in the High Court at Shah Alam (the first accused and the second accused respectively) for trafficking in dangerous drugs, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 ('the Act') read with s. 34 of the Penal Code.

The Prosecution's Case

[2] In brief, the prosecution's case is as follows. The first accused and the second accused who had arrived at KLIA from Doha were detained by L/Kpl Kenneth Khanna ('SP5') in front of Carousel E. The first accused was earlier seen "gelisah" when he retrieved two bags from the carousel. After the two bags were loaded onto the trolley, the first accused pushed the trolley towards the exit with the second accused following him.

[3] After the first and the second accused were detained, SP4, another police officer on duty at the carousel, checked their passports. The two bags were scanned and a body search was conducted on both the accused persons. Nothing incriminating was found on them and in the bags which had the name tag of Saeid Zoughi. SP4 then examined the two bags (exhs. P34 and P35) and from the base of the bags, he found translucent plastic packets (exhs. P11A & P12A) containing substances which were later confirmed by the chemist (SP2) to be methamphetamine weighing 5,324g.

[4] The search lists (exhs. P33A and P33B) attributed exhs. P34 and P35 to the first accused and the second accused respectively. Several clothes found in exh. P34 and exh. P35 had the DNA profile of both the first and the second accused.

[5] At the end of the prosecution's case the High Court made the following findings (rekod rayuan jld 3: pp. 257-260):

> ... firstly while SP4 categorically said that the two bags were carried by the two accused ("Beg tersebut dibawa oleh kedua-dua OKT tersebut"), SP5 who first spotted and went on to detain them ahead of SP4 was very firm and certain that he saw the first accused taking the two bags from the carousel, put them on the trolley and started to push the trolley. I found SP5 to be more than credible on this aspect of his testimony. The second accused carried a backpack which was seized by SP4 but not produced in court which obviously indicated that it did not contain anything incriminating. This backpack was not listed in search list P33B as alluded to earlier. There was no evidence led as to what markings SP4 or even the I.O. (SP7) made on the items recovered from the two bags (excluding the drug exhibits on which SP4 said he had made identification marks and which I will touch on later). These items refer to items (1.1) to (1.9) of serial number "04" in P33B (attributed to the second accused) and items

(1.1) till (1.7) of serial number "02" in P33A (with regard to the first accused) and P23A and P19A were from bag P35 (with regard to the second accused). No evidence was led on this. These markings nevertheless were crucial to the prosecution task of linking the second accused to the blue bag P35 through DNA analysis of and profiling from clothing or personal items recovered from this particular bag to show custody and control of the second accused over it and the contents. Since a bagpack was seized from the second accused but not listed in P33B, there was a real possibility that the items for DNA analysis could have come from the backpack. In the absence of identification marks, this could not be completely ruled out. From another front due to the absence of identification marks, it ought to be questioned whether it was safe to infer and accept that P23A is item (1.7) which refers to "(2) helai seluar panjang" and P19A is one of the four pairs of lady shoes as per item (1.9) of serial number "04" in P33B. The short answer would be a resounding "no" even though SP7 testified that she marked P19A and P23A with her marking HZB which meant nothing with absolutely no evidence from her that she took these items from bag P35 without disregarding the significance of the backpack at the same time. The prosecution could not assume on this seemingly obvious matter that had been overlooked. Furthermore SP7 admitted in cross examination that when she received the bag P35 the contents had been searched and mixed up. The backpack had also been searched. She agreed that on receipt of these exhibits she did not know for sure what items came from which bag.

In his submissions, the learned deputy had graciously conceded that there was no evidence against the second accused except for the DNA evidence. However based on the above reasons, there was a patent break in the chain of evidence pertaining to the items sent for DNA analysis and profiling other than the drug exhibits recovered from the base of the bag P35 in particular to implicate the second accused. The missing link in the chain as to the source from where P19A and P23A were taken had to be drawn in favour of the second accused in my considered view. In the result, there was no credible evidence to connect the second accused to bag P35 in the circumstances of the case that it was the first accused who was seem retrieving the two bags from the carousel. It was the first accused again who put the two bags on it based on the credible testimony of SP5 who testified that the second accused's reaction was of one who did not know what had happened when both of them were detained. I quote from SP5's testimony:

Reaksi yang don't know anything just wondering around there.

[6] The learned trial judge further made the following finding (rekod rayuan jld 3: p 261):

According to SP5, it was only the first accused who looked or appeared to be worried based on the experience he gleaned in the course of his work. This was relevant to throw a reasonable doubt on whether the second accused had the requisite knowledge leaving aside the s. 37(d) presumption of knowledge and possession which in any event on this

consideration I found difficult to invoke against the second accused since there was no available evidence she exercised any custody or control over P34 and P35 in the first place. SP5 saw exactly what happened and I accepted his evidence that it was just the first accused who handled and dealt with the two bags. Based on SP5's evidence the second accused's overall conduct and demeanour was consistent with ignorance and innocence in my opinion. To top it off, the bag P35 which the prosecution relied on to prove a *prima facie* case against the second accused did not bear her name on the baggage tag attached to it. At this stage taking these factors and circumstances collectively on a maximum evaluation of the evidence against the second accused, I was not prepared to convict her on the totality of evidence contained in the prosecution case if I decided to call upon her to enter her defence and were she to elect to remain silent.

[7] The learned trial judge therefore acquitted and discharged the second accused without calling for her defence.

[8] As for the first accused, the learned trial judge found that he had custody and control of exhs. P34 and P35 and since the drugs were concealed, the learned trial judge invoked s. 37(d) of the Act to presume knowledge on the part of the first accused of the drugs concealed in the bags. As for trafficking, the learned trial judge applied s. 2 of the Act and relied on the fact that the first accused flew into KLIA from Doha, and on the amount of the drugs which the learned judge found not likely to be intended for personal consumption.

[9] At pp. 267-269: rekod rayuan jld 3, the learned trial judge said:

This issue of trafficking was confined to the first accused since custody and control over the bags and the drugs found within them had been ruled out against the second accused for the reasons ventilated above. I found there was credible and sufficient evidence adduced that the first accused had custody and control over the two bags which he had consciously collected from the baggage carousel regardless of the fact that the baggage tags were in the name of Saeid Zoughi. In normal circumstances it would be unreasonable and illogical for someone to collect bags that belonged to others, identifiable bags with baggage tags in the names of others. In this case, the first accused recognized P34 and P35. He knew exactly these were the bags he was to retrieve from the carousel. He went on to collect them, put them on the trolley and started to push the trolley with the obvious intention to make for the exit. These factually undermined any submission that he was not in custody and control of the two bags. By the same argument, the DNA results were not significantly important where the first accused was concerned. Since the drugs were concealed at the bottom of the bags and by this fact constrained to come to an affirmative finding of possession, I was more inclined to and I did invoke the presumption of knowledge and possession against the first accused pursuant to s. 37(d) of the Dangerous Drugs Act ...

Concealment is an act included in the definition of trafficking under s. 2 of the Dangerous Drugs Act. It was not disputed that the first accused flew into KLIA, Sepang from Doha on flight QR 622 on the night he was arrested. The amount of Methamphetamine, 5324 grammes, concealed at the base of the bags over which he took custody and control from the point he retrieved them at carousel E strongly inferred, in the absence of any plausible explanation, that these drugs were conveyed from Doha to Kuala Lumpur for the purpose of trafficking and not likely intended for personal consumption (see *Ong Ah Chuan v. Public Prosecutor, Koh Chai Chang v Public Prosecutor* [1981] 1 MLJ 64 and *Public Prosecutor v. Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193).

[10] Having found that the prosecution had made out a *prima facie* case against the first accused, the learned trial judge called upon the first accused to enter his defence.

[11] Essentially, the defence of the first accused was that while travelling, his bag was damaged and he had borrowed the bag from Saeid Zoughi. Hence, he knew nothing of the concealed substance in the bag.

[12] The learned trial judge found the defence to be absurd and that the first accused had failed to rebut the presumption of knowledge on the balance of probability. The first accused was convicted and sentenced to death.

[13] Aggrieved by the acquittal and discharge of the second accused, the prosecution filed an appeal *vide* Appeal No. B-05-94-04/2013 while the first accused filed an appeal *vide* Appeal No. B-05-163-06/2013 against his conviction and sentence.

[14] We heard both the appeals together at the end of which we unanimously dismissed the appeal by the prosecution and we allowed the appeal of the first accused. We now give our reasons for the said decision.

The Appeal

[15] We will first deal with the prosecution's appeal against the acquittal and discharge of the second accused where the learned Deputy Public Prosecutor submitted the following grounds of appeal:

(i) the learned trial judge erred in not invoking the presumption of knowledge under s. 37(d) of the Act against the second accused; and

(ii) the learned trial judge erred in finding that the chain of exhibits had been compromised.

[16] It is trite that to make out a *prima facie* case of trafficking in dangerous drugs, possession is one of the elements to be established by the prosecution. It is also trite that possession involves both the physical and the mental element, namely the custody and control and knowledge of the drugs. Whilst physical element may be proved by direct evidence, the mental element is always a matter of inference (see *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337).

[17] In the instant case, learned Deputy highlighted the fact that the second accused and the first accused were charged with common intention and she had relied on the cases of *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241; *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17). It was submitted by learned Deputy that the elements of common intention had been established from the following facts:

(i) the second accused was travelling together with the first accused for a long period of time from Syria to Doha and to Kuala Lumpur, sat together with the first accused in the flight and landed at the KLIA; and

(ii) the personal belongings of the second accused were found in exh. P35 and the DNA of the second accused was found on two of the items (exhs. P19A and P23A).

[18] Citing *Zulfikar bin Mustaffah v. PP* [2001] 1 SLR 633, learned Deputy further submitted that there was wilful blindness on the part of the second accused in failing to examine the bags.

[19] On the second issue, to recapitulate, the learned trial judge had found that there was a mixed up on the exhibits relating to the second accused. The crux of learned Deputy's submission was that SP7, the investigating officer had marked the exhibits and that the DNA of the second accused found on the personal items was sufficient evidence against her.

Our Decision

[20] In respect of the prosecution's appeal against the acquittal and discharge of the second accused without calling for the defence, we found that the learned trial judge had conducted a maximum evaluation of the evidence led by the prosecution as required by the law. Having done so, Her Ladyship had concluded that she was not prepared to convict the second accused if the second accused had elected to remain silent. We found no error in the approach of the learned trial judge.

[21] The burden is on the prosecution to prove that the second accused had custody and control of the bags where methamphetamine was found. From the evidence of SP4, the learned trial judge had made a finding that the second accused had no custody and control and we found no reason to disturb the finding of the learned trial judge. Further, from the evidence of SP4, there is absent any conduct of the second accused where an inference of knowledge may be drawn against her. Coupled with the fact that the bags bore the name tag of Saeid Zoughi, it was our judgment that the learned trial judge was correct when Her Ladyship was not prepared to convict the second accused if she had remained silent (see *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311).

[22] As regards the exhibits, as stated by the Federal Court through Richard Malanjum CJ (Sabah & Sarawak) in *Lew Wai Loon v. PP* [2014] 2 CLJ 649, its admission and reliance upon as a piece of evidence requires factual analysis of the facts and/or events that are relevant not only for its admission as a piece of evidence but that such facts and/or events may also be relied upon to test its reliability and trustworthiness as a piece of evidence. The Federal Court has further said that this exercise is a fact sensitive exercise.

[23] Coming back to the instant appeal, we noted that in the High Court, the learned Deputy had conceded that the only evidence against the second accused was the DNA match on two clothing items, exhs. P19A and 23A. Having perused the judgment of the learned trial judge, we found that the learned trial judge had undertaken a detailed analysis of the evidence given by the investigating officer, SP7 in coming to her conclusion that it cannot be said for certain that exhs. P19A and 23A came from either exhs. P34 or P35.

[24] The finding of the learned trial judge was based on the evidence of SP7 that when she received P35 (which was attributed to the second accused as stated in the search list), the contents had been searched and mixed up. Although she had explained in re-examination the meaning of 'geledah' as 'pakaian dalam beg tidak berlipat dengan rapi', her evidence that she was not sure which exhibits came from which bag stood unchallenged (rekod rayuan jld 3: pp. 128; 140). To add to that uncertainty, the second accused was carrying a back pack, which was seized but was not tendered in court.

[25] In the circumstances, we agreed with the learned trial judge that the probable likelihood that exhs. P19A and 23A were retrieved from the back pack could not be excluded and that the markings of the exhibits by SP7 meant nothing in the absence of any nexus between exhs. P19A and P23A with the bag, exh. P35. The learned trial judge was therefore correct to state that there was a missing link in the chain of evidence as to the source from where exhibits P19A and P23A came from and that this missing link had to be drawn in favour of the second accused. The finding of the learned trial was not perverse as it found support in the evidence of SP7. There was no appealable error which warrants our appellate intervention.

[26] Seen in the light of the findings of the learned trial judge, the fact that the second accused had travelled with the first accused and had sat together in the flight before landing at KLIA, in our view was not sufficient to establish any pre-arranged plan or common intention between both the first accused and the second accused to traffic in methamphetamine.

[27] Insofar as the appeal by the first accused is concerned, learned counsel submitted on the issue of ownership of the bags exh. P34 and exh. P35 and on the failure of the prosecution to call Saeid Zoughi and to produce the

CCTV footage. Learned counsel contended that the above failure of the prosecution gave rise to an adverse inference under s. 114(g) of the Evidence Act 1950.

[28] It was not in dispute that the bags, exhs. P34 and P35 had the baggage tag in the name of Saeid Zoughi and that the flight manifest (exh. D39) showed that Saeid Zoughi was also travelling on the same flight with the first and the second accused. Learned counsel thus submitted that the act of picking up the bags by the first accused is common for people travelling in a group.

[29] While the first accused did not deny that some of the clothing found in the bag P34 belonged to him, it was his defence that Saeid Zoughi had offered the bag to him as his bag was damaged while travelling to Damascus and that it was Saeid Zoughi who had checked in the bags. The prosecution, submitted learned counsel, ought to have called Saeid Zoughi (who was also arrested on the same day) to clarify the status of the bags.

[30] We found that the learned trial judge had rejected the defence for the following reasons (RR3: p 271):

(i) that it was illogical for Saeid Zoughi to carry extra bags;

(ii) that the first accused gave no explanation why his bag was suddenly damaged at the Turkey/Syria check-point;

(iii) that it was baffling why the first accused had to travel in a roundabout manner from Teheran to Turkey onward to Syria when there was a direct flight from Teheran to Kuala Lumpur; and

(iv) that it was not put to the prosecution witnesses that the bags belonged to Saeid Zoughi.

[31] The learned trial judge found that the defence failed to rebut the presumption under s. 37(d) of the Act and had failed to case a reasonable doubt on the prosecution's case.

[32] We were of the view that the CCTV footage was not material to corroborate the evidence of SP5 that the first accused was seen "gelisah". There was no suppression of evidence and thus the non-production was not fatal to the prosecution's case (see *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 250). Be that as it may, evidence of conduct is an equivocal act which is capable of more than one interpretation, which cannot be referred in isolation and must be considered with other evidence or circumstances (see *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113).

[33] In the instant appeal, whilst we found that the learned trial judge had evaluated the defence of the first accused, in our view, the learned trial judge erred in relying heavily on the conduct of the first accused in picking the bags

from the carousel and was looking "gelisah" to presume that the first accused had knowledge of the drugs in the bags. The learned trial judge had failed to consider the other evidence which lent credence to the defence of the first accused that he had no knowledge of the drugs in the bags.

[34] The bag that was attributed to the first accused was exh. P34. There were clothes of different sizes in exh. P34 and not all the items found in exh. P34 were sent for DNA analysis. There was thus no evidence that all the items in exh. P34 belonged to the first accused which left a reasonable doubt as to whether the first accused had knowledge of the contents in the bag let alone the drugs which were hidden underneath in the bags.

[35] To prove possession, the prosecution must establish that the first accused had the power of disposal or the power to deal with the drugs to the exclusion of others (see *PP v. Denish Madhavan* [2009] 2 CLJ 209; *Siew Yoke Keong v. PP* [2013] 4 CLJ 149). We found in the instant appeal that the learned trial judge had failed to exclude the probability that the bags were under the control and custody of Saeid Zoughi prior to the arrest of the first accused (see *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113).

[36] The defence of the first accused was that his bag was damaged and Saeid Zoughi offered his (Saeid's) bag to the first accused where the first accused then transferred this belongings into the bag given by Saeid Zoughi. During cross-examination, the first accused disagreed with the learned Deputy that his story on the use of Saied's bag was not true. The learned Deputy had also put this question to the first accused: "I put it to you that you are the one who check in the bags and purposely check in under the name of Saeid Zoughi," to which the first accused answered "No". The first accused had also explained that he did not buy a new bag at the airport as suggested by learned Deputy because it was expensive.

[37] We did not lose sight of the fact that the luggage tags of exhs. P34 and P35 bore the name of Saeid Zoughi. This fact supported the defence version that it was Saeid Zoughi who had checked-in the bags and that the bags belonged to Saeid Zoughi. In our view, Saeid Zoughi was a necessary witness to confirm or to negate the defence of the first accused that he had no knowledge of the drugs in the bags as the bags were not his.

[38] We noted that the learned trial judge had considered the failure of the defence to put the name of Saeid Zoughi to the prosecution's witnesses and we are mindful of the authorities which state that such a failure may render the defence to be dismissed as an afterthought defence.

[39] On the facts and circumstances of this case, where Saeid Zoughi was available but he was not called by the prosecution nor was he offered to the defence, we were of the view that the failure ought not to be ruled against the first accused. In the light of the defence and bearing in mind the elementary principle of criminal law that the burden to prove its case lies on

the prosecution throughout, we were of the view that the failure of the prosecution to call Saeid Zoughi had left a gap in the prosecution's case and had rendered the conviction of the first accused unsafe (see *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1; [1993] 3 MLJ 1; *Wan Rusdi Wan Musa v. PP* [2012] 7 CLJ 16).

[40] We therefore unanimously allowed the appeal of the first accused. We set aside the order of conviction and sentence. The first accused was acquitted and discharged.